the cause is to be remanded to that court, with directions to proceed to a hearing upon the merits.

Decree reversed.

The Venus, Rae, Master.

Prize of war.

If a citizen of the United States establishes his domicil in a foreign country, between which and the United States hostilities afterwards break out, any property shipped by such citizen, before knowledge of the war, and captured by an American cruizer, after the declaration of war, must be condemned as lawful prize.[1]

Upon a shipment of goods, to be sold on joint account of the consignee and shipper, or of the latter alone, at the option of the consignee, the right of property does not vest in the consignee, until he has made his election, under the option given him.

If two partners own jointly a commercial house in New York, and one of them obtain an American register for a ship, by swearing that he, together with his partner, of the city of New York, merchant, are the only owners of the vessel for which the register is obtained, when, in fact, his partner is domiciled in England, the vessel is liable to forfeiture, under the act of congress of December 31st, 1792.

Appeal from the sentence of the Circuit Court for the district of Massachusetts. The following were the facts of the case, as stated by Washington, J., in delivering the opinion of the court.

This is the case of a vessel which sailed from Great Britain, with a cargo belonging to the respective claimants, as was contended, before the declaration of war by the United States against Great Britain was or could have been known by the shippers. She sailed from Liverpool, on the 4th of July 1812, under a British license, for the port of New York, and was captured, on the 6th of August 1812, by the American privateer Dolphin, and sent into the district of Massachusetts, where the vessel and cargo were libelled in the district court.

The ship, 100 casks of white lead, 150 crates of earthenware, 35 cases and 3 casks of copper, 9 pieces of cotton bagging, and a quantity of coal, were claimed by Lenox & Maitland. 198 packages of merchandise and 25 pieces of cotton bagging were claimed by Jonathan Amory, as the joint property of James Lenox, William Maitland and Alexander *McGregor; not [*254
distinguishing the proportions of each: but the 25 pieces of cotton bagging were afterwards claimed for McGregor as his sole property, and also 5 trunks of merchandise. 21 trunks of merchandise were claimed by James Magee, of New York, as the joint property of himself and John S. Jones, residing in Great Britain.

The district court, on the preparatory evidence, decreed restitution to Magee & Jones, and also to Lenox & Maitland, except as to the 100 casks of white lead; as to which, and as to the claim of McGregor, further proof was ordered. From this decree, so far as it ordered restitution of the merchandize to Magee & Jones, and to Maitland, and of the ship to Lenox & Maitland, the captors appealed to the circuit court, where the decree was affirmed *pro formâ*, and an appeal was taken to this court.

In April 1813, the cause was heard, on further proof, in the district

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[1] The Frances, *post*, p. 371. See United States *v.* Guillem, 11 How. 60; The William Bagaley, 5 Wall. 408; Miller *v.* United States, 11 Id. 305.

court; and in August, the claim of McGregor was rejected, as well as that of Lenox & Maitland to the white lead. But at another day, on a further hearing, the court ordered restitution to McGregor of one-fourth of the property claimed by him, and condemned the other three-fourths as belonging to his partners, being British subjects. Both parties appealed, as did also Lenox & Maitland, in relation to the white lead. A *pro formâ* decree of affirmance was made, from which an appeal was taken to this court.

Maitland, McGregor and Jones were native British subjects, who came to the United States, many years prior to the present war, and, after the regular period of residence, were admitted to the rights of naturalization. Some time after this, but long prior to the declaration of war, they returned to Great Britain, settled themselves there, and engaged in the trade of that country, where they were found carrying on their commercial business, at the time these shipments were made, and at the time of the capture. Maitland is yet *in Great Britain, but has, since he heard of the capture, expressed his anxiety to return to the United States; but has been prevented from doing so, by various causes set forth in his affidavit. McGregor actually returned to the United States some time in May last; Jones is still in England.

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Pitman, for the captors.—In relation to the several claims set up in this case, it will be contended, on the part of the captors, 1st. That they are to be determined, as it respects the capacity to claim, by the national character of the claimants, at the time of the capture. If the claimants, at the time of capture, were British subjects, the property is undoubtedly liable to condemnation.

It is admitted, on all hands, that the claimants, Maitland, McGregor and Jones, had acquired a domicil in Great Britain, at the time of the declaration of war; and were actually domiciled in that country, at the time of the capture: they must, therefore, be considered as British subjects, in reference to the property claimed by them respectively. Nor will an intention to return to the United States, if that intention be not manifested until after the capture, be of any avail; for it is a principle in prize law, that the national character of property, during war, cannot be altered, *in transitu*, by any act of the party, subsequent to the capture.

The following cases are considered as going to establish the foregoing positions: *The Herstelder*, 1 Rob. 97, 115; *The Danckebaar Africaan*, Ibid. 90, 107; *The Boedes Lust*, 5 Ibid. 207, 257; *The Indian Chief*, 3 Ibid. 12, 17; *The Vigilantia*, 1 Ibid. 11, 13; *The Experiment*, 2 Dall. 42; *The Indian Chief*, 3 Rob. 29; *Livingston* v. *Maryland Ins. Co.*, 7 Cr. 506; *The Franklin*, 3 Bos. & Pul. 207 n; *The Citto*, 3 Rob. 37, 38; *The Diana*, 5 Ibid. 60; *The Harmony*, 2 Ibid. 264, 322; *The Jonge Klassina*, 5 Ibid. 265, 270.

It appears, that Maitland has, since he heard of the capture, expressed his anxiety to return to the United *States; and that McGregor did actually return. But we contend, upon the principle above stated, that neither the intention of Maitland, although formally naturalized in this country, nor the actual return of McGregor, inasmuch as they did not take place until after the capture, can avail for the purposes of their respective claims.

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And even if it should be proved, that Maitland's intention to return

existed previous to the capture, it would not avail him, if nothing more than intention could be proved. The case of *The President*, 5 Rob. 277, is in point: it is there decided, that an intention to return is of no avail, unless that intention be evidenced by some *overt* act. Here, no such *overt* act, on the part of Maitland, is proved. The following cases go to establish the same point: *The Citto*, 3 Rob. 37, 38; *Curtissos' Case*, cited in *The Diana*, 5 Ibid. 65, and in *The Indian Chief*, 3 Ibid. 12, 17. As to McGregor, see *The Harmony*, 3 Ibid. 264, 322.

McGregor's return to America, after capture of the vessel, will not avail him unless he can prove, 1st. That he had, previous to the capture, set himself in motion to return. 2d. That he had done so, with a *bonâ fide* intention of remaining in America. 3d. That he had no intention of returning to England. See the case of *The Indian Chief*, 3 Rob. 17, 12.

But the national character of these parties, Maitland, McGregor and Jones, does not depend upon domicil. They were originally native subjects of Great Britain; and, after being naturalized in this country, they returned to England, and resumed their native allegiance, in violation of their oath of naturalization. By this conduct, we contend, that they lost the character of American citizens, and could not *flagrante bello*, resume it, for the mere purpose of protecting their property. In a court of the law of nations, as well as by the navigation laws of the United States, they cannot but be considered *as British subjects. In the case of *La Virginie*, 5 Rob. 98, Sir W. Scott said, "It is always to be remembered, that the native character easily reverts, and that it requires fewer circumstances to constitute domicil, in the case of a native subject, than to impress the national character on one who is originally of another country." [*257

It is not necessary to contend against the doctrine of expatriation. We do not deny the right. We contend only, that in order to render his naturalization valid, for the purposes in question, a man must expatriate himself *bonâ fide*, must remove from his original country and not return to it, *animo manendi*. In support of this doctrine, see the act of congress of March 27th, 1804 (2 U. S. Stat. 206), also act of 31st December 1792, § 2 (1 Ibid. 288), *Talbot* v. *Jansen*, 3 Dall. 153. The British doctrine on this subject is well known. "Once a British subject, always a British subject," is an established rule in the English law. Great Britain respects the naturalization laws of the United States only for commercial purposes. If one of her subjects be naturalized in this country, and afterwards return to a British territory, she considers him as still, to all intents and purposes, a British subject. She does not even require him to abjure his adopted allegiance.

It is to be presumed, that Maitland, McGregor and Jones knew the laws of their own country: yet, with this knowledge, they returned to England; and that, as it appears from their subsequent conduct, not for a temporary purpose merely, but *animo manendi*. They have estalished there a house of trade. They have placed themselves and their property under the protection of Great Britain, and cannot now, with any show of reason, claim protection from the United States, although the United States may still claim something from them. *Murray* v. *The Charming Betsey*, 2 Cr. 120.

It is evident, from all the circumstances of the present case, that Maitland did not intend to return to the United States, until he heard of the capture of the vessel: *on the contrary, it appears that, with a [*258

full knowledge of the war, he made his election to remain in England. When McGregor left England for the United States, he embarked as a British subject. His passport was from the privy council, and signed by Lord Sidmouth; whereas, American citizens obtained their passports from the alien office. He is still a partner in a house of trade in England; he is engaged in a British trade. It remains for these parties to explain their conduct. We have stated the facts, and the burden of proof now lies on the claimants. Such would be the rule, even if they were neutrals. *The Citto*, 3 Rob. 37, 38; *The Dree Gebroeders*, 4 Ibid. 191, 232; *The Bernon*, 1 Ibid. 88, 104; *The Vigilantia*, Ibid. 12, 15; *The Portland*, 3 Ibid. 40, 41; *The Ocean*, 5 Ibid. 91; *The Harmony*, 2 Ibid. 264, 322.

In attempting to establish the national character of these claimants, as American citizens, it was said in the court below, that they held landed property in this country. This argument is overthrown by the decision in the case of *The Dree Gebroeders* cited above; 4 Rob. 194, 235.

2. It appears that McGregor has fraudulently attempted to cover the whole property in question; his claim, therefore, being false in part, he cannot recover even his own share, although we should admit him to be an American citizen. The whole, therefore, is justly liable to condemnation. *The Susa*, 2 Rob. 212, 257; *The Odin*, 1 Ibid. 210, 250; *The Rosalie and Betty*, 2 Ibid. 281, 343; *The Graaf Bernstorf*, 3 Ibid. 92, 109; *The Jonge Pieter*, 4 Ibid. 65, 74.

3. As to the claim of Lenox & Maitland to the ship, we contend, 1st. That, under the act of congress of March 27th, 1804 (2 U. S. Stat. 206), she cannot be considered as an American vessel. By that act, it is declared, "That no ship or vessel shall be entitled to be registered as a ship or vessel of the United States, or, if registered, to the benefits thereof, if owned, in whole or in part, by any person naturalized in the United States, and resid-
*259] ing for more than one year in *the country from which he originated, &c. But Maitland had been residing in England more than a year, and consequently, was not entitled to an American register. 2d. That Lenox being found in violation of the law, as it respected the ship's register, he is not *rectus in curiâ* for the purpose of claiming the ship. *Vide* the cases cited in *The Rapid*, on this point, viz., *The Walsingham Packet*, 2 Rob. 72, 77; *The Cornelis and Maria*, 5 Ibid. 28, 32; *The Recovery*, 6 Ibid. 348. 3d. That Lenox & Maitland having attempted to conceal enemy's property (the 100 casks of white lead), and to withdraw the same from the belligerent rights of the United States, by a fraudulent shipment and claim, their claims to the property captured therewith must be rejected, and the penalty of confiscation attaches to the same. This principle is intended to be applied to the claim of Maitland as well to the cargo as to the ship.

There can be no reasonable doubt, that the lead belonged to some person or persons other than the claimants. The following facts are considered as conclusive on this point: 1. The original bill of parcels inclosed in a letter dated 3d July 1812, from Wm. Maitland & Co. to Lenox & Maitland, is headed thus: "Thomas Holloway bought of Thomas Walker, Malby & Co., lead merchants," and is dated at Liverpool, June 2d, 1812. 2. In the bill of lading of the goods claimed as the property of Lenox & Maitland, in which the white lead is included, the freight and primage is cast upon the lead, in

the margin of the bill of lading, and not upon the crates, copper, bagging or coal. 3. To a letter from Maitland to Lenox, of 22d August 1812, found on board the Lady Gallatin, is annexed a list of goods shipped by William Maitland & Co., by the Venus, on account of and consigned to Messrs. J. Lenox and William Maitland. In this list, all the goods claimed by Lenox & Maitland, and by Lenox, Maitland and McGregor, are enumerated, except the white lead. 4. Upon the order for further proof, in the district *court, no further proof was offered respecting the lead. Maitland, in his affidavit made January 7th, 1813, in Liverpool, swears that the [*260 copper, crates, coals and bagging were purchased and shipped on board the Venus, on the sole account and risk of himself and Lenox: he also swears as to their joint property with McGregor; but says not a word about the lead. From these circumstances, we must conclude, that the white lead was the property of Thomas Holloway, an acknowledged British subject; that it is, therefote, liable to condemnation, and subjects the property captured with it to the same fate.

4. In respect to the claim of Magee & Jones, we contend, that at the time of capture, the property belonged solely to Jones, a British morchant and subject, and is, therefore, to be condemned as enemy property. In the bill of lading of these goods, they are expressed to be shipped by McGregor & Co. unto and on account of James Magee & Co., of New York. The invoice is signed by Jones, at Manchester, and describes them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co., of New York; but does not specify on whose account and risk. It is, therefore, to be considered, as at the risk of Jones. *Vide* on this point, the case of *The Marianna*, 6 Rob. 27.

In a letter from John S. Jones to James Magee & Co., dated at Manchester, 1st July 1812, he says, "This serves to hand you invoice of 21 trunks prints, per Venus, amount 1323*l.* 13*s.* 0*d.*, subject to the same terms as the goods per Aristomenes; that is, to be sold on joint account, or on mine, at your option." Now, to effect a change of property, it is essential, that there be a contract of sale agreed to by both parties. Here appears to have been no such contract. The property, therefore, at the time of capture, was exclusively in Jones. If Jones had a right to stop these goods *in transitu*, so had the United States, who, by the laws of war, succeeded to his rights. *The Constantia*, 6 Rob. 127. *The Copenhagen*, 1 Ibid. 245, 291, is an analogous case.

**Stockton*, contrà, for McGregor, contended, 1st. That McGregor, to the exclusion of his partners, Lenox and Maitland, was [*261 owner of one-half of 198 packages of Manchester goods, and one-half of 25 pieces of cotton bagging, and to the whole of five trunks of goods. 2d. That these goods were not the goods of an enemy, and ought to be restored to McGregor as an American citizen.

In support of the first point, he relied on the ship's papers, on certain letters of Maitland & Co., and of McGregor himself, on the affidavits of McGregor in the court below, &c. He contended, that the testimony on this point, introduced since the evidence *in præparatorio*, was incompetent; but if competent, not important. The cause was heard in September 1812, and further proof allowed for the claimants; but no such order on the part

of the captors, nor any order to proceed by plea and proof. The cause stood, on their side, on the proof taken *in præparatorio*. The evidence introduced by them is upon simple affidavit. *The Adriana*, 1 Rob. 263, 313. Letter from Sir W. Scott and Sir J. Nicholl to Mr. Jay, 1 Rob. (Am. ed.) p. 8.

Second point. As to the national character of McGregor. He came to the United States a minor; was an established merchant in New York before 1795; he was then naturalized; he married in New York, and purchased a house there, before his departure for England, which he still retains: he has also purchased large tracts of land in the states of New York and New Jersey, which he yet owns: he resided about twelve years in New York. His return to England was produced by temporary causes. In 1798, he returned thither on account of the sickness of his wife, who died in Scotland. His second return was for his own health. In 1805, he commenced business in Liverpool, as an American merchant. His employment was that of an American merchant, shipping goods from England, and receiving American produce to sell there on commission. His residence in England was in time of peace: it was lawful, and could in no manner impair
*262] his rights as a *citizen of the United States. He had no intention to abandon his American rights, or to remain permanently in England; but intended to return to the United States, whenever his duty should require him to return. Such a residence, in time of peace, could not stamp a hostile character upon him; and at the breaking out of war, he was entitled to a reasonable time to depart from the British dominions, before he could forfeit his American character, and become identified with the enemy. He did depart therefrom, and returned to the United States, with his family, within a year after the declaration of war. His having formed a connection in trade with British partners was a lawful act, which did not derogate from his American character, but extended and facilitated his business as an American merchant.

Congress did not mean to authorize the capture of property belonging to mere inhabitants of the hostile country. When the bill to authorize the president to issue letters of marque was brought into the senate of the United States, in June 1812, it authorized him to issue them against all persons inhabiting in Great Britain or its territories or possessions; but was amended in the senate, so as to authorize him to issue them only against the united kingdom of Great Britain and Ireland and the subjects thereof. See the Secret Journal of the Senate for June 1812.

Many cases have been cited by the counsel for the captors, in his endeavor to prove this a case for condemnation. The answer to most of them is, that the controversy in those cases was between neutrals and belligerents; not between Great Britain and her subjects. The two cases are entirely different in principle. The connection between a citizen and his government depends on the municipal law of the land. The rights of a neutral depend upon the law of nations.

With regard to the doctrine of naturalization, it is well known, that, by the law of England, a person naturalized by act of parliament is as much a subject, to all intents and purposes, as a native. Co. Litt. 129 *a*; 1 Bl. Com. 374. McGregor, we have seen, was naturalized in the United States. But it is said, that he has returned to his former allegiance, and thereby

*lost his American character. This we deny. He returned to England in time of peace, by which, we contend, he neither forfeited nor abandoned his character as an American citizen. Our act of naturalization contains nothing to authorize the opinion that he did. Nor could he throw off his adopted allegiance, if he would. If found in arms against us, he would be punished as a traitor.

The act of March 1804, which has been cited by the captors, merely declares that a naturalized citizen shall lose one particular privilege of his citizenship, by residing for more than a year in the country from which he originated; from which, the implication is clear, that he shall retain all his other privileges.

In the case of *The Charming Betsy*, 2 Cranch 64, and in the case of *McIlvaine* v. *Coxe's Lessee*, 4 Cranch 211, the decision of this court was, that residence in a foreign country does not deprive an American citizen of his rights as such. It has been decided also, that by such residence, in time of peace, the national character is not changed upon the sudden breaking out of a war. Residence in time of peace is lawful; and if the person so residing return to his own country, in a reasonable time after the breaking out of the war, he does not lose his original national character. *Marryat* v. *Wilson*, 1 Bos. & Pul. 442; Vattel, lib. 1, c. 19, § 218, p. 169. Sir W. Scott has never said, that such a residence would, on the sudden breaking out of a war, give a hostile character to the resident: he has never gone so far as to condemn property situated like that now in question. *The Ocean*, 5 Rob. 90.

Vattel (lib. 3, c. 4, § 63, p. 477) says, that the sovereign declaring war is to allow those subjects of the enemy who are within his dominions at the time of the declaration, a reasonable time for withdrawing with their effects: and certainly a nation ought not to grant less indulgence to its own citizens than the enemy allows them. I trust, this court is not yet prepared to adopt, even with respect to neutrals, much less with regard to American citizens, the rigid rules of the British court of admiralty—a mere political court; a prerogative court regulated by the king's orders in council, *designed to give Great Britain the sovereignty of the ocean, to subject the whole commerce of the world to her grasp, and to make the law of nations just what her policy would wish it to be. [*264

It is doubtful, whether the court ought to condemn, under the circumstances of the present case, although it should be proved that the property in question was enemy property. The shipment, in the present case, was made on the faith of the representations of the American *charge d'affaires*, Mr. Russell; who had given it as his opinion, that property shipped after the repeal of the British orders in council, and before knowledge of the war, would be admitted into the United States. Under these circumstances, the conduct of the owners of this property was perfectly justifiable. It has been decided in a British court, that property which comes into the possession of a nation, under the public faith, is not liable to forfeiture, and congress has virtually acknowledged the same principle, by passing the act of 27th February 1813, remitting the forfeitures which had accrued under the non-intercourse act of March 1st, 1809. (2 U. S. Stat. 804.) *Vide* Mr. Russell's statement in the report of the committee of congress, Journal of House of Representatives; and the case of *The Althea*, cartel, which was

captured at Halifax as American property, and discharged by Judge CROKE, because it came into the possession of the British under the public faith.

Pitman, as to the objection to the invocation of papers from other courts, cited the following authorities: 14th Interrogate, 1 Rob. (Am. ed.) 323; *The Romeo*, 6 Ibid. 351; *The Convenientia*, 4 Ibid. 170, 205; *The Magnus*, 1 Ibid. 27, 31; *The Eenrom*, 2 Ibid. 2, 3; *The Susa*, Ibid. 211, 254; *The Rosalie and Betty*, Ibid. 281, 343. He observed, that there was an order, in the circuit court, for further proof on the part of the captors, saving the question whether it were a case for further proof.

Harper, for Lennox & Maitland, and Jones & Magee. Lennox & Mait-
*265] land claim, *1st. The ship Venus. 2nd. As their joint property, the white lead, crates, copper, cotton bagging and coal. 3d. One moiety of 198 packages of merchandise and cotton bagging, as the joint property of Lennox & Maitland and Alexander McGregor, and shipped by them.

Magee & Jones claim 21 trunks of prints, part of the cargo of the Venus, as their joint property.

Lenox and Maitland are natives of Scotland. They removed many years since to New York, where the former was naturalized, on the 10th of November 1794, and the latter, on the 8th of July 1804. They entered into partnership in trade, in 1797, and established their house in New York, in which they were alone interested, under the name and firm of J. Lenox & W. Maitland; which has continued to the present time. For fourteen years, they both resided, without interruption, in the city of New York, carrying on the business of their American house, as American citizens; and, as such, they hold valuable real estate in the city and in the state of New York, and also hold American registered ships. Lenox still resides in New York; but Maitland, in July 1810, to promote the interest of their commercial establishment in New York, by attending the sales of the shipments to Europe and the returns to America, went to Liverpool, in England, where, in 1811, he took a house and counting-room, and transacted business for the said concern, under the name and firm of W. Maitland & Co., consisting only of said Lenox and Maitland. He has long since given up his counting-room, and attempted to dispose of his house; and is still in England, detained there by sickness. In July 1812, and long before and at the time of the capture of the Venus, by the Dolphin, Lenox and Maitland were the sole owners of the said ship, under an American register. The Venus sailed from Liverpool for New York, on the 4th of July 1812, with a cargo of British produce and manufactures, the proceeds of the funds of Lenox & Maitland, with instructions to wait off the Hook, to know if the goods could be landed.
*266] Proceeding *with her cargo on this voyage, she was captured and libelled as has been before stated.

James Magee was naturalized, 9th August 1803, and has ever since resided and been established in New York. John S. Jones was naturalized, 10th December 1795, and resided in New York thirteen years. In 1810, he went to Manchester (England), and arrangements were made for shipping goods to Magee, the partner in New York.

It has been contended, on the part of the captors, with regard to the ship, that, by the laws of the United States, she is not to be deemed an American ship, nor entitled to the benefits of an American register, on account

of the residence of Maitland in Liverpool, for more than a year. Admitting, for the sake of argument, that this position is correct, still, we contend, that the ship is not forfeited. She has merely incurred the disability attached to a foreign ship. Her owners are still American citizens, but have lost the privilege of availing themselves of the register. It is contended, however, that this very disability which attaches to the ship, renders her belligerent property. This is truly a novel doctrine. There is no law by which it can be supported.

As to the right of Lenox to his share of the ship, there can be no reasonable doubt. He is certainly an American citizen, and has done nothing to forfeit that character. He has been naturalized in this country, and has continued to reside here ever since. It is said, however, that he has made a false claim to the white lead. This point will be considered in the course of the argument.

Maitland, it is true, has been residing in England for a considerable time past; and it is upon this ground, that the ship and cargo, are claimed by the captors. They contend, that his residence in England (although an American citizen) clothes him with a hostile character. *To this it may be answered, that the residence which imparts a hostile character, must be residence connected with some act of commerce blended with the commercial transactions of the enemy. Mere residence does not give a hostile character, so long as the resident refrains from all voluntary acts tending to the aid and comfort of the enemy. If he engages in the enemy's commerce, he must, to be sure, be considered as an enemy; but even then, only to the extent of the commercial property engaged in the hostile trade, which may chance to be captured. A man in an enemy's country may send home books or furniture purchased, before the war, for his own use, and they will not be hostile property. There must be a trading with the enemy, to constitute an offence. Trading is essential; time is not. A mere continuation in an enemy's country, after the commencement of hostilities, without any act of trade, has never been decided to constitute a man an enemy. Sir W. Scott himself allows a person found in the enemy's country, a reasonable time to withdraw his effects, and even to trade with the enemy, so far as it may be necessary for the removal of his property. *The Indian Chief*, 3 Rob. 12, 17; *The Madonna delle Gracie*, 4 Ibid. 161, 195; *The Hoop*, 1 Ibid. 165, 196. [*267

But it is said, that though an illegal act should be proved to have been committed by Maitland, yet that Lenox has been guilty of making a false claim to part of the cargo, which act of Lenox has criminally affected the property of Maitland. We answer, that the doctrine on the subject of covering enemy property, applies only to neutrals; but Lenox was a citizen of the United States. Besides, it does not by any means appear, that, in making this claim, Lenox was influenced by a fraudulent motive. His conduct was, in all probability, owing to mistake. He had not seen the letters and papers proving the property, claimed by him, to belong to the enemy; and therefore, cannot be supposed to have known that fact.

It is further urged by the captors, that a letter by the Lady Gallatin, of 22d August 1812, shows that a purchase of 100 bags of cotton was made by Maitland, after knowledge of the war. *To the admissibility of the invoked papers, among which this letter is one, we have already [*268

objected, and must still insist upon the objection. Setting aside those papers, it does not appear, that Maitland did purchase the cotton, after knowledge of the war: and the presumption ought to be in his favor. But suppose, this single purchase was made one day after war was known to exist (which is all the captors contended for), is this sufficient to fix a hostile character, especially, under circumstances like those attending this transaction, when it was universally supposed, that the repeal of the orders in council would have put an end to the war?

With regard to Jones, it has only been proved, that he was residing in England, a few months after the commencement of hostilities; but there is no evidence that he has not returned; nor is there any evidence of his having traded with the enemy. The burden of proof lies on the captors.

Dexter, in reply.—In cases like that now before the court, the advantage in obtaining evidence is clearly on the side of the claimants. They have in their power the knowledge of all the facts relative to the case. The evidence *in præparatorio* consists of the documents on board the ship, and the testimony of the crew. They may make out their own case. If the evidence in their favor be deficient, they may have an order for further proof, which does not give the captors any opportunity of introducing further evidence on their part. Under circumstances so manifestly advantageous, if the claimants do not fully prove their case, the presumption must be against them. Whether the claimants in the present case have satisfactorily done so, it is for the court to decide.

With regard to the question of domicil. Sir W. Scott has decided, that the *animus manendi* is to be presumed, under circumstances perfectly analogous to those of the present case. What are the facts with regard to the several parties whose claims are now disputed? McGregor, it appears, is a native of Scotland: he became a citizen of the United States, by naturalization, in 1795, and resided at New York until 1802, except a temporary *269] *visit to his native country, for the health of his wife. In 1802, he left New York for his own health, and in 1804, established himself in a house of trade in Liverpool (England), in connection with James Dennistown, a British subject. Two other partners were afterwards admitted, both British subjects. McGregor was the only one of the partners who resided in Liverpool, and was the acting partner of the concern. He married a second wife in Great Britain, and had several children there, during his residence in Liverpool. These facts are abundantly sufficient to establish his domicil.

The question, then, remains—did he take timely and sufficient steps, after knowledge of the war, to divest himself of his British character, and return to the United States? This does not appear. On the contrary, it appears from papers invoked and introduced into this cause, and it is not contradicted, that he continued his connection with his British partners, ten months after the declaration of war, and as acting partner of the house, made a shipment to Halifax. He has not, in any of his affidavits, declared that he did not continue his trade. The testimony on his part does not deny all secret trusts. He comes into court, well informed of the suit, yet without the books, articles of partnership, original bills of parcels, and the other papers connected with the transactions under consideration.

It has been urged in his defence, that being a commission-merchant, having the property of others in his hands, and being the only acting partner of the firm, he was justified in remaining in England, until he could wind up his business. But this is no sufficient justification. The contracts of a citizen residing abroad, must be consistent with the interests of his country. If the good of his country requires his return, as in the event of war, it is his duty to leave his business in other hands. McGregor might have left his affairs to the care of his partners.

Most of the facts with regard to Maitland have been already stated. It may be added, however, that he continued to reside in England and was transacting business *there, as late as April 1813 ; whereas, the war was known on the 24th or 26th of July 1812. In his letter of the 22d of August 1812, in which he informs his partner of a purchase of cotton wool he had just made, he says nothing of any intention of returning to the United States. His continuance in England is defended on nearly the same grounds as that of McGregor, viz., his extensive mercantile concerns. Sickness was not alleged by him as an excuse, until 13th April 1813. [*270

As to the goods shipped by Jones, it has already been observed, that in his letter to Magee of 1st of July 1812, he gives him his option either to be interested in them or not. Of course, at the time of the shipment, they were the sole property of Jones ; and before the letter was received by Magee—before there was a possibility of his making an election—the goods were captured ; but it is an acknowledged rule of prize law, that the character of goods cannot change *in transitu ;* at the time of capture, therefore, they were the sole property of Jones, and must, we contend, be condemned *in toto.*

Besides the particular circumstances which have been urged in justification of the individuals concerned in this cause, a general defence has been set up, viz : That though the property in question should be determined to be British, yet it came here under the faith of the nation ; and is, therefore, entitled to protection. Vattel, it is said, lays down this doctrine : this is not denied. But did the property in controversy come into the country under the national faith ? It was not here, at the breaking out of hostilities. It was not brought into the country, until after the declaration of war ; and then it was brought in as a prize of war. Besides, if it was considered as protected on this principle, why was the attempt made to cover it under the name of McGregor ? This has a suspicious appearance ; and shows clearly that the claimants themselves placed little reliance on the circumstance which is now urged in their defence.

As to the objection to the admission of the invoked papers, it need only be observed, that the counsel for the *claimants is under a mistake on the subject. There was an order for further proof on the part of the captors ; and under that order, these papers were invoked. [*271

The great question of law on the subject of domicil yet remains to be examined. Three classes of residents are recognised by the law of nations. 1st. Mere residents. 2d. Domiciled residents. 3d. Natural-born subjects.

Before entering upon the discussion of the main question, I would remark, with regard to some observations which have fallen from the counsel for the claimants, respecting the severity of the rules adopted by the British court of admiralty, that these rules have been applied by Sir W.

Scott with equal rigor to British subjects as to neutrals; which is a sufficient answer to the allegation that they have been introduced merely to subserve the grasping policy of the British nation, and destroy all neutral commerce.

1. With regard, then, to the first class of residents. It is admitted, that mere residence in a foreign country, for a particular temporary purpose, without engaing in the commerce of the country, is not sufficient to change the national character.

2. Residence in a foreign country, connected with the carrying on a general trade and mixing in the commercial affairs of the nation, constitutes domicil; thereby making a man, *sub modo*, a subject of that foreign country: and in case of war breaking out between his original and adopted country, if he continues, notwithstanding, to reside and trade in the latter, he is to be considered by his original country, as invested with a hostile character to all intents and purposes. He ought not, it will be admitted, to be considered in this light, immediately on the declaration of war: he ought, perhaps, to be allowed a reasonable time to make his election whether to
*272] remain *where he is, or return to his own country. Respectable authorities, however, have said that, if required, he is bound to return. Sir W. Scott says, he is bound immediately to put himself in motion to return.

3. As to mere native subjects, it is needless to make any remarks. The persons whose national character is now in question are natural-born subjects of Great Britain, naturalized in the United States, and who afterwards returned to the country of their nativity. These persons, we contend, are, even without the intervention of a war, as much British subjects as if they had never been naturalized in another country. The British government had a right to prevent their return to the United States. In saying this, we would not be understood as admitting the legality of impressment; the cases are materially different.

The naturalization law of the United States requires permanent residence: and no longer than that residence continues, can a man claim the privileges of naturalization. Before he can be admitted to those privileges, he must abjure all allegiance to the state of which he was before a citizen. By so doing, he binds himself not to return to that state; by returning, he violates his oath; and can thereafter claim no protection from the country which he has thus abandoned. Abjuration does not absolve him from his former allegiance; he may incur new duties, but he cannot swear away his old obligations. It is for this court to explain the true meaning of the law of naturalization. It may, however, be observed, that neither the constitution nor the laws of the United States consider a naturalized citizen in the same light as a native. The laws of Great Britain also, and indeed the laws of every country, make a distinction between the two. A native is considered as a citizen, wherever he goes; but a person naturalized is no longer looked upon as a citizen, than while he continues in his adopted country. No nation confers the privilege of naturalization without an equivalent; no nation extends its protection to naturalized subjects, if they return to their former country. And shall we be an exception? Shall we be the first to extend to naturalized foreigners this Quixotic protection?

*273] *The expression "*ad fidem utriusque regis*," from *Calvin's case*, has been mis-translated, "the faith of both kings." Had that been

the meaning of the phrase, it would have been *utrumque regum*, in the plural: the meaning is, that a man may be the subject of either power according to his residence. Were the doctrine, that he may be the subject of both, correct, he would have it in his power to enjoy the privileges of both governments, without being subject to the duties of either.

With regard to the false claim of Lenox. It is a rule of prize law, that a man who makes a false claim, to protect enemy property, forfeits any property of his own that may be captured with it. This Lenox appears to have done, with respect to the white lead. If he has, not only his own property is forfeited, but that of Maitland, his partner, must share the same fate. What has been said by the counsel for the claimants to exculpate Lenox, is mere conjecture.

As to the ship. It is clear, that the register was improperly obtained—not to say *fraudulently*. Maitland, by residing in England, was not entitled to an American register. Lenox, by concealing, when on oath, the fact of Maitland's residence in England, becomes *particeps criminis*, and if he mixes his interest with that of his partner, the same decree must be rendered as to the property of both.

Stockton, with regard to the withholding of papers with which McGregor was taxed by the counsel on the opposite side, stated, that the decree of the court below was only rendered in October last, when McGregor had the first intimation that the papers were required; since which, there had not been time to obtain them.

Saturday, March 12th, 1814. (Absent, Livingston, J.) WASHINGTON, J., after stating the facts of the case, delivered the opinion of the majority of the court, as follows:—The claims of Maitland, McGregor and Jones are resisted, *in toto*, upon an objection to the national character of the claimants. The general question affecting *these parties, will, for the present, be postponed, in order to dispose of particular objections which are made [*274 to all the claims, either in whole or in part, and which will depend on the particular circumstances applying to those cases.

1. The first claim that will be considered will be that of Lenox & Maitland to the 100 casks of white lead, which, it is contended, is the property of Thomas Holloway, an acknowledged British subject, but shipped in June 1812, by William Maitland & Co. (a house established in Liverpool, and composed of William Maitland and James Lenox), to Lenox & Maitland, a house established at New York, and composed of the same parties. To establish the fact of property in Thomas Holloway, the captor relies upon the following evidence: The original bill of parcels, inclosed in a letter, under date of the 3d of July 1812, from William Maitland & Co. to Lenox & Maitland, which is headed thus, "Thomas Holloway bought of Thomas Walker & Co., lead merchants," dated June 2d, 1812. In corroboration of this *primâ facie* evidence of property in Holloway, the freight and primage of this lead is cast in the margin of the bill of lading, but not so upon the acknowledged property of Lenox & Maitland, the owners of the ship, and included in the same bill of lading; from which circumstances, it is argued, that this article did not belong to Lenox & Maitland; since, if it did, no freight could have been charged on it, any more than upon the other parts of the cargo claimed by them. In addition to this, in a list of goods shipped

by William Maitland & Co. by this vessel, on account of and consigned to Lenox & Maitland, and inclosed in a letter of the 22d August 1812, from the former to the latter, by the Lady Gallatin, all the goods claimed by that house separately, and also by them and McGregor jointly, are enumerated, except this parcel of white lead. This evidence is certainly very strong to fix a hostile character on this property; and is rendered conclusive, by the omission of Maitland, in his affidavit made under the order for further proof, to say anything in relation to the white lead, although he is very particular as to all the other property claimed by Lenox & Maitland, and by
*275] that house jointly with McGregor. This court is, *therefore, of opinion, that the court below did right in rejecting this claim.

2. The next claim to be considered, is that of Magee & Jones to a part of the cargo on board this vessel. Magee is a citizen of the United States, settled in New York, and connected with Jones in a house of trade. It is urged by the captors, that the whole of this property ought to have been condemned as the sole property of Jones. The bill of lading of these goods expresses them to be shipped by McGregor & Co., unto and on account of James Magee & Co., of New York. The invoice is signed by Jones, at Manchester, in England, and describes them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co., of New York; but it does not specify on whose account and risk. In a letter from Jones to Magee, dated the 1st of July 1812, covering an invoice of these goods, he says, "they are to be sold on joint account, or on mine, at your option." The whole question, as to the exclusive property of Jones in these goods, is rested, by the captors, upon the above expressions giving an option to Magee to be jointly concerned or not in the shipment. The question of law is, in whom the right of property was at the time of capture? To effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale, agreed to by both parties; and if the thing agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which the master, to many purposes, is considered to be. The only evidence of a contract, such as is now set up, appears in the affidavit of Magee, who states, that in 1810, he was in England, and agreed with Jones, that the latter should ship goods on joint account, when the intercourse between the two countries should be opened; and that in consequence of this agreement, the present shipment was made. Now, admit that such an agreement was made, yet the delivery of the goods to the master of the vessel was not for the use of Magee & Jones, any more than it was for the use of the shipper solely; and consequently, it amounted to nothing so as to divest the property out of the shipper,
*276] until Magee should elect to take them on joint account, or *to act as the agent of Jones. Until this election was made, the goods were at the risk of the shipper, which is conclusive as to the right of property.

3. The next claim is that of Lenox & Maitland to the ship. The facts in relation to this subject are, that James Lenox, as joint-owner, with William Maitland, of this ship, obtained, in November 1811, a register for her, which was granted upon his oath, that he, together with William Maitland, of the city of New York, merchant, were the only owners. At this time, Maitland was domiciled in Great Britain; and it is contended, that the state-

ment that Maitland was of New York, was untrue, and subjected the vessel to forfeiture, under the act of congress of the 31st of December 1792 ; and that although no claim is interposed for the United States, still the forfeiture produced by the misconduct of Lenox, is sufficient to turn him out of court, whatever disposition may ultimately be made of the property. The rule of the prize court is correctly stated in this argument ; and the only question is, whether a forfeiture did accrue to the United States. The act of congress directs, that the owner who takes the oath, in case there are more than one owner, shall, in his oath, specify the names and places of abode of such owners, and that they are citizens of the United States, if such be the fact ; and if one or more of them reside abroad, as a partner or partners in a co-partnership consisting of citizens, and carrying on trade with the United States, that such is the case. The law then proceeds to declare, that if any of the matters of fact in the said oath alleged, within the knowledge of the party swearing, shall not be true, the ship shall be forfeited to the United States. It cannot be denied, that at the time this oath was taken, William Maitland was a resident merchant of Great Britain, carrying on trade with the United States ; a fact totally inconsistent with that alleged in the oath, that he was of the city of New York. It is probable, and the court is willing to believe, that this statement was innocently made, under a misconception of the real character which the foreign domicil of Maitland had impressed upon him. But still, the law required explicitness on this point, and marked the distinction between a person residing abroad, and one residing within the United States. It must be admitted, in point of law, *that the fact sworn to by Lenox was not true ; and the consequence is, a forfeiture of the ship to the United States. The claim, therefore, of Lenox & Maitland to this vessel must be rejected. What order shall be made as to the ultimate disposition of the property, must depend upon the opinion which this court may give in some other cases touching this subject. [*277

The great question involved in this, and many other of the prize cases which have been argued, is, whether the property of these claimants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruizer, ought to be condemned as lawful prize. It is contended by the captors, that as these claimants had gained a domicil in Great Britain, and continued to enjoy it, up to the time when war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and consequently, that it may legally be seized as prize of war, in like manner as if it had belonged to real British subjects. But if not so, it is then insisted, that these claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there resettled themselves, they became reintegrated British subjects, and ought to be considered by this court in the same light as if they had never emigrated. On the other side, it is argued, that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States ; and that, until such election was, *bonâ fide*, made, the courts of this country are bound to consider them as

American citizens, and their property shipped before they had an opportunity to make this election, as being protected against American capture.

There being no dispute as to the facts upon which the domicil of these claimants is asserted, the questions of law alone remain to be considered. They are two: 1st. By what means and to what extent, a national character
*278] may be impressed upon a person, different *from that which permanent allegiance gives him? And 2d. What are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or in which he had been naturalized?

1. The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, *domicil*, which he defines to be, "a habitation fixed in any place, with an intention of always staying there." Such a person, says this author, becomes a member of the new society, at least, as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicil, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration. Vatt. p. 92, 93. Grotius no where uses the word *domicil*, but he also distinguishes between those who stay in a foreign country, by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates strangers, and the latter, subjects; and it will presently be seen, by a reference to the same author, what different consequences these two characters draw after them.

The doctrine of the prize courts, as well as of the courts of common law, in England, which, it was hinted, if not asserted, in argument, had no authority of universal law to stand upon, is the same with what is stated by the above writers; except that it is less general, and confines the consequences resulting from this acquired character to the property of those persons engaged in the commerce of the country in which they reside. It is decided by those courts, that whilst an Englishman, or a neutral, resides in a hostile country, he is a subject of that country, and is to be considered
*279] (even *by his own or native country, in the former case), as having a hostile character impressed upon him.

In deciding whether a person has obtained the right of an acquired domicil, it is not to be expected, that much, if any, assistance should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicil had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is, that the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts,

such evidence of an intention permanently to reside there, as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered, is the *animus manendi ;* and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear, that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi ;* and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. *The Bernon*, 1 Rob. 86, 102. As to some other rules of the prize courts of England, particularly those which fix a national character upon a person on the ground of constructive residence, or the peculiar nature of his trade, the court is not called upon to give an opinion at this time : because, in this case, it is admitted that the claimants had acquired a right of domicil in Great *Britain, at the time of the breaking out of the war between that country and the United States. [*280

2. The next question is, what are the consequences to which this acquired domicil may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance ? A neutral, in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals ; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state, domiciled in a neutral country ; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bonâ fide*, to quit the country *sine animo revertendi. The Indian Chief*, 3 Rob. 12, 17. The reasonableness of this rule can hardly be disputed. Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his *native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of [*281

returning. If anything short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable, that the evidence of a *bonâ fide* intention to remove should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or, at least, rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies those declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded, which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put it in his power to claim whichever may best suit his purpose, when it is called in question? If his property be taken, trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the country of the enemy to his own, then neutral, and therefore, that as a neutral, the trade was lawful? If war exist between the country of his residence and his native country, and his property be seized by the former, or by the latter, shall he be heard to say in the former case, that he was a domiciled subject of the country of the captor, and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character; and thus to parry the belligerent rights of both? It is to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned has been adopted.

Upon what sound principle, can a distinction be framed, between the case of a neutral, and the subject of one belligerent domiciled in the country of the other, at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, *282] *before the war, in their character of subjects of that country, so long as they continued to retain their domicil; and when a state of war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows, that the property, which was once the property of a friend, belongs now, in reference to that property, to an enemy. This doctrine of the common law and prize courts of England is founded, like that mentioned under the first head, upon national law; and it is believed to be strongly supported by reason and justice. It is laid down by Grotius, p. 563, "that all the subjects of the enemy who are such from a permanent cause, that is to say, settled in the country, are liable to the law of reprisals, whether they be natives or foreigners; but not so, if they are only trading or sojourning for a little time." And why, it may be confidently asked, should not the property of such subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicil, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance

thereto ; they are obliged to defend it (with an exception in favor of such a subject, in relation to his native country), in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their totality, is to be considered as the goods of the nation, in regard to other states. It belongs, in some sort, to the state, from the right which she has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. Vatt. 147 ; and also, lib. 1, c. 14, § 182. In reprisals, continues the same author, we seize on the property of the subject, just as we would that of the sovereign ; everything that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit entrusted to the public faith. Lib. 2, c. 18, § 344. Now, if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the *nation, it would seem difficult to maintain, that the same consequences would [*283 not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

If, then, nothing but an actual removal, or a *bonâ fide* beginning to remove, can change a national character, acquired by domicil, and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person, in his character of a subject, what is there that does, or ought, to exempt it from capture by the privateers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent? It is contended, that a native or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance ; and that, until such election is made, his property ought to be protected from capture by the cruizers of the latter. This doctrine is believed to be as unfounded in reason and justice, as it clearly is in law. In the first place, it is founded upon a presumption that the person will certainly remove, before it can possibly be known, whether he may elect to do so or not. It is said, that this presumption ought to be made, because, upon receiving information of the war, it will be his duty to return home. This position is denied. It is his duty to commit no acts of hostility against his native country, and to return to her assistance, when required to do so ; nor will any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse her permission to him to withdraw whenever he wishes to do so, unless under peculiar circumstances, which, by such removal at a critical period, might endanger the public safety. The conventional law of nations is in conformity with these principles. It is not uncommon to stipulate in treaties, that the subjects of each shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects either to remove or to remain. They are left free to choose for themselves ; and when they have made their election, they claim the right of enjoying *it under the treaty; But until the election is made, [*284 their former character continues unchanged.

Until this election is made, if his property found upon the high seas, engaged in the commerce of his adopted country, should be permitted, by the cruisers of the other billigerent, to pass free, under the notion that he may elect to remove, upon notice of the war, and should arrive safe, what is to be done, in case the owner of it should afterwards elect to remain where he is? or, if captured and brought immediately to adjudication, it must, upon this doctrine, be acquitted until the election to remain is made known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made, is safe; and if he finds it best to return, it is safe, of course. It is safe, whether he goes or stays. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and well established in the prize courts of England, and which ought not, without strong reasons which may render them inapplicable to this country, to be disregarded by this court. The rule there, is, that the character of property, during war cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule, indeed, goes further: as to the correctness of which in its greatest extension, no opinion need now be given; but it may safely be affirmed, that this change cannot and ought not to be effected by an election of the owner and shipper of it, made subsequent to the capture, and more especially, after a knowledge of the capture is obtained by the owner. Observe the consequences which would result from it. The capture is made and known. The owner is allowed to deliberate whether it is his interest to remain a subject of his adopted, or of his native country. If the capture be made by the former, then he elects to be a subject of that country; if by the latter, then a subject of that. Can such a privileged situation be tolerated by either belligerent? Can any system of law be correct, which places an individual who adheres to one belligerent, and, to the period of his election to remove, *contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war, and made his election, is altogether a novel theory, and seems, from the course of the argument, to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on this subject be correct, no such hardship can exist. For if, before the election is made, his property on the ocean is liable to capture by the cruizers of his native and deserted country, it is not only free from capture by those of his adopted country, but it is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted.

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It will be observed, that in the foregoing opinion respecting the nature and consequences of domicil, very few cases have been referred to. It was thought best not to interrupt the chain of argument, by stopping to examine cases; but faithfully to present the essential principles to be extracted from those which were cited at the bar, or which have otherwise come under the

view of the court, and which applied to the subject. With what success this has been executed, is not for me to decide. But there are two or three cases which seem to be so applicable, and at the same time, so conclusive on the great points of this question, that it may not be improper briefly to notice them. In support of the general principles, that the national character of the owner at the time of capture, must decide his right to claim, and that a subject is condemned by it, even in the courts of his native country, without time being allowed to him to elect to remove, the following cases may be referred to.

In *The Boedes Lust*, 5 Rob. 247, it was decided, that the property of a resident of Demarara, shipped before hostilities of any kind had occurred between Holland and Great Britain, but which was captured, under an embargo declared by England upon Dutch property, as preparatory to war, which ensued soon after the seizure, was, by the retroactive effect of the war, applied to property so seized, to be considered *as the property [*286
of an enemy taken in war. In this case, Sir W. Scott lays it down, that, where property is taken in a state of hostility, the universal practice has ever been, to hold it subject to condemnation, although the claimants may have become friends and subjects, prior to the adjudication. This case is somewhat stronger than the present, in the circumstance, that in that, the state of hostility, alleged to have existed at the time of capture, was made out, by considering the subsequent declaration of war as relating back to the time of seizure under the embargo, by which reference it was decided to be a hostile embargo, and of course, tantamount to an actual state of war. But this case also proves, not only that the hostile character of the property at the time of capture, establishes the legality of it, but that no future circumstance changing the hostile character of the claimant to that of a friend or subject, can entitle him to restitution. Whether the claimant, in this case, was a neutral or a British subject, does not appear. But if the former, it will not, it is presumed, be contended, that he is, upon the principles of national law, less to be favored in the courts of the belligerent, that a subject of that nation domiciled in the country of the adverse belligerent.

Whitehill's Case, however, referred to frequently in Robinson's Reports, comes fully up to the present, because he was a British subject, who had settled but a few days in the hostile country, but before he knew or could have known of the declaration of war; yet, as he went there with an intention to settle, this, connected with his residence, short as it was, fixed his national character, and identified him with the enemy of the country he had so recently quitted. The want of notice, and of an opportunity to extricate himself from a situation to which he had so recently and so innocently exposed himself, could not prevail to protect his property against the belligerent rights of his own country, and to save it from confiscation. There are many other strong cases upon these points, which I forbear to notice particularly, from an unwillingness to swell this opinion already too long.

The sentence of the court is as follows: This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof, it is decreed and ordered, that the sentence of *the circuit court of Massachusetts condemning the one hundred casks of [*287
white lead claimed by Lenox & Maitland be, and the same is hereby affirmed

with costs. And that the sentence of the said circuit court as to the claim of Magee & Jones to twenty-one trunks of merchandise be, and the same is hereby reversed and annulled; and that the said twenty-one trunks of merchandise be condemned to the captors; and that the sentence of the said circuit court as to the ship Venus claimed by Lenox & Maitland be, and the same is hereby reversed; and that the said ship Venus be condemned, the one-half thereof to the captors, the other half to the United States, under the order of the said circuit court. That the sentence of the said circuit court as to the claim of William Maitland to one-half of one hundred and fifty crates of earthenware, thirty-five cases and three casks of copper, nine pieces of cotton bagging and twenty and four-twentieths tons of coal, be, and the same is hereby reversed, and that the same be condemned to the captors; and that the sentence of the said circuit court, as to the claim of Alexander McGregor to one-half of one hundred and ninety-eight packages of merchandise, as the joint property of himself and Lenox & Maitland, and of the claim of William Maitland for one-fourth of the same goods, and of the claim of Alexander McGregor to twenty-five pieces of cotton bagging, and five trunks of merchandise, be, and the same is hereby reversed and annulled, and that the same be condemned to the captors; and that the said cause be remanded to the said circuit court for further proceedings to be had therein.

JOHNSON, J., declined giving an opinion.

STORY, J.—I do not sit in this cause: but the great question involved in it, respecting the effect of domicil on national character, forms the leading point in many cases before the court. Those cases have been ably and fully argued, and I have listened, with great solicitude and attention, to the discussion. On so important a question, where a difference of opinion has been expressed on the bench, I do not feel at liberty to withdraw myself from the responsibility which the law imposes on me. The parties in the other cases have a right to my opinion; and however painful it is, in the embarrassing *288] *situation in which I stand, to declare it, I shall not shrink from what I deem a peremptory duty. The question is not new to me: it has been repeatedly before me in the circuit court, and has been applied sometimes to relieve and sometimes to condemn the claimant. I shall not pretend to go over the grounds of argument; but content myself with declaring my entire concurrence in the opinion expressed by Judge WASHINGTON on this point.

MARSHALL, Ch. J. (*dissenting.*)—I entirely concur in so much of the opinion delivered in this case, as attaches a hostile character to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy; and I subscribe implicitly to the reasoning urged in its support. But from so much of that opinion as subjects to confiscation the property of a citizen, shipped before a knowledge of the war, and which disallows the defence founded on an intention to change his domicil and to return to the United States, manifested in a sufficient manner, and within a reasonable time after knowledge of the war, although it be subsequent to the capture, I feel myself compelled to dissent. The question is undoubtedly complex and intricate. It is difficult to draw a line of discrimination

which shall be at the same time precise and equitable. But the difficulty does not appear to me to be sufficient to deter courts from making the attempt.

A merchant residing abroad for commercial purposes may certainly intend to continue in the foreign country, so long as peace shall exist, provided his commercial objects shall detain him so long, but to leave it the instant war shall break out between that country and his own. This intention, it is not necessary to manifest during peace; and when war shall commence, the belligerent cruizer may find his property on the ocean, and may capture it, before he knows that war exists. The question, whether this be enemy property or not, depends, in my judgment, not exclusively on the residence of the owner at the time, but on his residence, taken in connection with his national character as a citizen, and with his intention to continue or to discontinue his commercial domicil in the event of war. *The evidence of this intention will rarely, if ever, be given during peace. It [*289
must, therefore, be furnished, if at all, after the war shall be known to him; and that knowledge may be preceded by the capture of his goods. It appears to me, then, to be a case in which, as in many others, justice requires that subsequent testimony shall be received to prove a pre-existing fact. Measures taken for removal, immediately after a war, may prove a previous intention to remove, in the event of war, and may prove that the captured property, although, *primâ facie*, belonging to an enemy, does, in fact, belong to a friend. In such case, the citizen, in my opinion, has a right, in the nature of the *jus postliminii*, to claim restitution.

As this question is not only decisive of many claims now depending before this court, but is also of vast importance to our merchants generally, I may be excused for stating, at some length, the reasons on which my opinion is founded.

The whole system of decisions applicable to this subject, rests on the law of nations as its base. It is, therefore, of some importance to inquire how far the writers on that law consider the subjects of one power, residing within the territory of another, as retaining their original character, or partaking of the character of the nation in which they reside.

Vattel, who, though not very full to this point, is more explicit and more satisfactory on it than any other whose work has fallen into my hands, says, "the citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or *indigenes*, are those born in the country, of parents who are citizens. Society not being able to subsist and to perpetuate itself but by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are obliged to defend it, because it grants *them pro- [*290
tection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the laws, or custom gives them. The perpetual inhabitants are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united and subject to the society, without participating in all its advantages.

The domicil is the habitation fixed in any place, with an intention of always staying there. A man does not, then, establish his domicil in any place, unless he makes sufficiently known his intention of fixing there, either tacitly or by an express declaration. However, this declaration is no reason why, if he afterwards changes his mind, he may not remove his domicil elsewhere. In this sense, he who stops, even for a long time, in a place, for the management of his affairs, has only a simple habitation there, but has no domicil."

A domicil, then, in a sense in which this term is used by Vattel, requires not only actual residence in a foreign country, but "an intention of always staying there." Actual residence without this intention amounts to no more than "simple habitation." Although this intention may be implied, without being expressed, it ought not, I think, to be implied, to the injury of the individual, from acts entirely equivocal. If the stranger has not the power of making his residence perpetual, if circumstances, after his arrival in a country, so change, as to make his continuance there disadvantageous to himself, and his power to continue, doubtful; "an intention always to stay there" ought not, I think, to be fixed upon him, in consequence of an unexplained residence previous to that change of circumstances. Mere residence, under particular circumstances, would seem to me, at most, to prove only an intention to remain so long as those circumstances continue the same, or equally advantageous. This does not give a domicil. The intention which gives a domicil is an unconditional intention "to stay always."

The right of the citizens or subjects of one country to remain in another, *291] depends on the will of the sovereign *of that other; and if that will be not expressed otherwise than by that general hospitality which receives and affords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there. Vattel says, "enemies continue such wherever they happen to be; the place of abode is of no account here; it is the political ties which determine the quality. While a man remains a citizen of his own country, he remains the enemy of all those with whom his nation is at war."

It would seem to me, to require very strong evidence of an intention to become the permanent inhabitant of a foreign country, to justify a court in presuming such intention to continue, when that residence must expose the person to the inconvenience of being considered and treated as an enemy. The intention to be inferred solely from the fact of residence, during peace, for commercial purposes, is, in my judgment, necessarily conditional, and dependent on the continuance of the relations of peace between the two countries. So far as the law of nations from considering residence in a foreign country, in time of peace, as evidence of an intention "always to stay there," even in time of war, that the very contrary is expressed. Vattel says, "the sovereign declaring war can neither detain those subjects of the enemy who are within his dominions at the time of the declaration, nor their effects. They came into his country on the public faith; by permitting them to enter his territory and to continue there, he tacitly promised them liberty and security for their return. He is, therefore, to allow them a reasonable time for withdrawing with their effects; and if they stay beyond

the time prescribed, he has a right to treat them as enemies, though as enemies disarmed."

The stranger merely residing in a country, during peace, however long his stay, and whatever his employment, provided it be such as strangers may engage in, cannot, on the principles of national law, be considered *as incorporated into that society, so as, immediately on a declaration of war, to become the enemy of his own. "His property," says Vattel, "is still a part of the totality of the wealth of his nation." "The citizen or subject of a state, who absents himself for a time, without any intention to abandon the society of which he is a member, does not lose his privilege by his absence; he preserves his rights, and remains bound by the same obligations. Being received in a foreign country, in virtue of the natural society, the communication and commerce, which nations are obliged to cultivate with each other, he ought to be considered there as a member of his own nation, and treated as such." [*292

The subject of one power inhabiting the country of another, ought not to be considered as a member of the nation in which he resides, even by foreigners; nor ought he, on the first commencement of hostilities, to be treated as an enemy by the enemies of that nation. Burlamaqui says, "as to strangers, those who settle in the enemy's country, after a war is begun, of which they had previous notice, may justly be looked upon as enemies, and treated as such. But in regard to such as went thither before the war, justice and humanity require that we should give them a reasonable time to retire; and if they neglect that opportunity, they are accounted enemies." If this rule be obligatory on foreign nations, much more ought it to bind that of which the individual is a member.

I think, I cannot be mistaken, when I say that, in all the views taken of this subject by the most approved writers on the law of nations, the citizen of one country, residing in another, is not considered as incorporated in that other, but is still considered as belonging to that society of which he was originally a member. And if war break out between the two nations, he is to be permitted, and is expected, to return to his own. I do not perceive in those writers any exception with regard to merchants.

It must, however, be acknowledged, that the great extension *of commerce has had considerable influence on national law. Rules have been adopted, perhaps, by general consent, principles have been engrafted on the original stalk of public law, by which merchants, while belonging politically to one society, are considered commercially as the members of another. For commercial purposes, the merchant is considered as a member of that society in which he has his domicil; and less conclusive evidence than would seem to be required in general cases, by the law of nations, has been allowed to fix the domicil for commercial purposes. But I cannot admit, that the original meaning of the term is to be entirely disregarded, or the true nature of this domicil to be overlooked. The effects of the rule ought to be regulated by the motives which are presumed to have induced its establishment, and by the convenience it was intended to promote. [*293

The policy of commercial nations receives foreign merchants into their bosom; and permits their own citizens to reside abroad for the purposes of trade, without injury to their rights or character as citizens. This free

intercommunication must certainly be believed, by the nations who allow it, to be promotive of their interests. Nor is this opinion ill founded. Nothing can be more obvious, than that the affairs of a commercial company will be transacted to most advantage, by being conducted, as it respects both purchase and sale, under the eye of a person interested in the result. The nation which takes an interest in the prosperity of its commerce, can feel no inclination to restrain its citizens from residence abroad, for the purposes of commerce; nor will it hastily construe such residence into a change of national character, to the injury of the individual. It is not the policy of such a nation, nor can it be its wish, to restrain its citizens from pursuing abroad a business which tends to enrich itself. It ought not, then, to consider them as enemies, in consequence of their having engaged in such pursuit, in the country of a friend, who, before their removal, becomes an enemy.

If, indeed, it be the real intention of the citizen, permanently to change his national character, if it be his choice to remain in the country of the
*294] enemy, during *war, there can be no harshness, no injustice, in treating him as an enemy. But if, while prosecuting his business in a foreign country, he contemplates a return to his own; if, in the prosecution of that business, he is promoting rather than counteracting the interests and policy of the country of which he is a member, it would seem to me, to be pressing the principle too far, and to be drawing conclusions which the premises will not warrant, to infer, conclusively, an intention to continue in a country which has become hostile, from a residence and trading in that country, while it was friendly; and to punish him by the confiscation of his goods, as if he was fully convicted of that intention.

It is admitted to be a general rule, that, while the state of things remains unaltered, while the motives which carried the citizen abroad continue, while he still prosecutes a business of uncertain duration, his capacity to prosecute which is not impaired, his mercantile character is confounded with that of the country in which he resides, and his trade is considered as the trade of that country. It will require but a slight examination of the subject, to perceive the reason of this rule; and that, to a certain extent, it is convenient, without being unjust.

In times of universal peace, the question of national character can arise only when some privilege or some disability is attached to it, or in cases of insurance. A particular trade may be allowed, or be prohibited, to the merchants of a particular nation, or property may be warranted to be of a particular nation. If, in such cases, the residence of the individual be received as evidence of his national mercantile character, the subjects of inquiry are simplified, the questions are reduced to a plain one, and the various complex inquires, which might otherwise arise, are avoided. There is, therefore, much convenience in adopting this principle, in such a state of things; and it is not perceived, that any injustice can grow out of it; since the individual to whom the rule is applied, is not surprised by any new or unlooked-for event.

*295] So, if war exists between two nations. Each belligerent *having a right to capture the property of the other, found on the ocean, each being intent on destroying the commerce of the other, and on depriving it of every cover under which it may seek to shelter itself, will

certainly not allow the advantages of neutrality to a merchant residing in the country of his enemy. Were this permitted, the whole trade of the enemy could assume, and would assume, a neutral garb.

There is, in general, no reason for supposing that a merchant residing in a foreign country, and carrying on trade, means to withdraw from it, on its engaging in war with any other country to which he is bound by no obligation. By continuing, during war, the domicil acquired in peace, he violates no duty, offends against no generally acknowledged principle, and retains all his rights of residence and commerce. The war, then, furnishes no motive for presuming that he is about to change his situation, and to resume his original national character.

These reasons appear to me to require the rule as a general one, and to justify its application to general cases. But they do not, in my opinion, justify its application to the case of a merchant whom war finds engaged in trade in a country which becomes the enemy of his own. His country ought not, I think, to bind him by his residence during peace; nor to consider him as precluded by it from showing an intention that it should terminate with the relations of peace.

When it is considered, that his right to remain and prosecute that trade in which he had been engaged during peace, is forfeited; that his duty, and most probably, his inclinations, call him home; that he has become the enemy of the country in which he resides; that his continuance in it exposes him to many and serious inconveniences; that his person and property are in danger; it is not, I think, going too far, to say, that this change in his situation may be considered as changing his intention on the subject of residence, and as affording a presumption of intending to return.

Let it be remembered, that, according to the law of nations, domicil depends on the intention to reside permanently *in the country to which the individual has removed; and that a change of this intention is, at any time, allowable. If, upon grounds of general policy and general convenience, while the circumstances under which the residence commenced, continue the same, residence and employment in permanent trade be considered as evidence of an intention to continue permanently in the country, and as giving a commercial national character, may not a total change in circumstances—a loss of the capacity to carry on the trade—be received, in the absence of all conflicting proof, as presumptive evidence of an intention to leave the country, and as extricating the trade, carried on in the time of supposed peace, from the national character, so far as to protect it from the perils of war? At any rate, do not reason and justice require that this change of circumstances should leave the question open, to be decided on such other evidence as the war must produce? [*296

The great object for which an American merchant fixes himself in a foreign country, is, most generally, to carry on trade between that country and his own. In almost every case of this description, before the court, the claimant is a member of a house established in the United States; and his business abroad is subservient to the business at home. This trade is annihilated by the war.

If, while peace subsists between the United States and Great Britain, while the American merchant possesses there all the commercial rights

allowed to the citizens of a friendly nation, and may carry on, uninterruptedly, his trade to his own country, he is presumed, his intentions being unexplained, to intend remaining there always, and may, for general convenience, be clothed with the commercial character of the nation in which he resides, ought this presumption to be extended, by his own government, beyond the facts out of which it grows, if the interest of the individual be materially affected by that extension? Do not reason and justice require, that we should consider his original intention as being only co-extensive with the causes which carried him to and detained him in the country, as being, in its nature, conditional, and dependent on the continuance of those causes?

*297] *If such a person were required, on his arrival in a foreign country, to declare his real intentions on the subject of residence, he would, most probably, say, if he spoke honestly, "I come for the purpose of trade: I shall remain while the situation of the two countries permits me to carry on my trade lawfully, securely, and advantageously: when that situation so changes as to deprive me of these rights, I shall return." His intention, then, to reside in the country, his domicil in it, and consequently, his commercial character, unless he continued his trade after war, would be clearly limited by the duration of peace. It would not, I think, be unreasonable to say, that the intention, to be implied from his conduct, ought to have the same limitation.

To me, it seems, that a mere commercial domicil, acquired in time of peace, necessarily expires, at the commencement of hostilites. Domicil supposes rights incompatible with a state of war. If the foreign merchant be not compelled to abandon the country, it is not because his commercial character confers on him a legal right to stay, but because he is especially permitted to stay. If, in this, I am correct, it would seem to follow, that, if all the legal consequences of a residence in time of peace do not absolutely terminate with the peace, yet the national commercial character which that residence has attached to the individual, is not so conclusively fixed upon him, as to disqualify him from showing, that, within a reasonable time after the commencement of hostilities, he made arrangements for returning to his own country. If a residence and trading, after the war, be not indispensably necessary to give the citizen merchant, or his property, a hostile character, yet removal, or measures showing a determination to remove, within a reasonable time after the war, may retroact upon property shipped before a knowledge of the war, and rescue that property from the hostile character attached to the property of the nation in which the individual resided.

The law of nations is a law founded on the great and immutable principles of equity and natural justice. To draw an inference against all probability, whereby, a citizen, for the purpose of confiscating his goods, is clothed, against his inclination, with the character of an enemy, in conse-

*298] quence of an act which, when committed, *was innocent in itself, was entirely compatible with his political character as a citizen, and with the political views of his government, would seem to me to subvert those principles. The rule which, for obvious reasons, applies to the merchant, in time of peace or in time of war, the national commercial character of the country in which he resides, cannot, in my opinion, without subverting those principles, apply a hostile character to his trade carried on during

peace so conclusively as to prevent his protecting it, by changing that character, within a reasonable time after a knowledge of the war.

My opinion, then, is, that a mere commercial domicil, acquired by an American citizen in time of peace, especially, if he be a member of an American house, and is carrying on trade auxiliary to his trade with his own country, ought not to be considered positively as continuing longer than the state of peace. The declaration of war is a fact which removes the causes that induced his residence in the foreign country: they no longer operate upon him. When they cease, their effects ought to cease: an intention which they produced, ought not to be supposed to continue. The character of his property shipped before a knowledge of the war, ought not to be decided absolutely by his residence at the time of shipment or capture, but ought to depend on his continuing to reside and trade in the enemy country, or on his taking prompt measures for returning to his own.

This is the conclusion to which my mind would certainly be conducted, might I permit it to be guided by the lights of reason and the principles of natural justice. But it is said, that a course of adjudications has settled the law to be otherwise; that we cannot, without overturning a magnificent system, bottomed on the broad base of national law, and of which the parts are admirably adjusted to each other, yield to the dictates of humanity on this particular question. Sir WILLIAM SCOTT, it is argued at the bar, has, by a series of decisions, developed the principles of national law on this subject, with a perspicuity and precision which mark plainly the path we ought to tread.

*I respect Sir WILLIAM SCOTT, as I do every truly great man; and I respect his decisions; nor should I depart from them on light grounds: but it is impossible to consider them attentively, without perceiving that his mind leans strongly in favor of the captors. Residence, for example, in a belligerent country, will condemn the share of a neutral in a house, trading in a neutral country; but residence in a neutral country will not protect the share of a belligerent or neutral in a commercial house established in a belligerent country. In a great maritime country, depending on its navy for its glory and its safety, the national bias is, perhaps, so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced; and on this account, it appears to me, to be the more proper to investigate rigidly the principles on which his decisions have been made, and not to extend them where such extension may produce injustice. While I make this observation, it would betray a want of candor, not to accompany it with the acknowledgment, that I perceive in the opinions of this eminent judge, no disposition to press this principle with peculiar severity against neutrals. He has certainly not mitigated it when applying it to British subjects. [*299

With this impression respecting the general character of British admiralty decisions, I proceed to examine them so far as they bear on the question of domicil. The case of *The Vigilantia* does not itself involve the point. But in delivering his opinion, the judge cited two cases of capture which have been quoted and relied on at bar. In each of these, the share of the partner residing in the neutral country, was restored, and that of the

partner residing in the belligerent country was condemned. But these decisions applied to a trade continued to be carried on during war.

In a subsequent case, the share of the partner residing in the neutral country also was condemned; and the lords commissioners said, that the principle on which restitution was decreed in each of the first-mentioned
*300] cases, was, "that they were merely at the commencement *of a war." They said, that "a person carrying on trade habitually in the country of the enemy, though not resident there, should have time to withdraw himself from that commerce; that it would press too heavily on neutrals, to say, that, immediately, on the first breaking out of a war, their goods would become subject to confiscation."

On these cases, it is to be observed, that although the first two happened at the commencement of the war, yet they happened during a war; and the partners whose interest was condemned, do not appear to have discontinued their residence and trading in the country of the enemy, after war had taken place. The declaration "that it would press too heavily on neutrals, to say, that, immediately on the first breaking out of a war, their goods would become subject to confiscation," though applied to a neutral not residing in the belligerent country, clearly discriminates, in a case of capture, between the rights of parties, at the commencement of a war, and at a subsequent period. But it is sufficient to say, that neither the case itself, nor the cases and opinions cited in it, apply directly to the question before this court.

In the case of *The Harmony*, the property of Mr. Murray, an American citizen, residing in France, was condemned on account of that residence. But Mr. Murray had removed to France, during the war, and had continued there for four years. The scope of the argument of Sir William Scott goes to show, that the single circumstance of residence in the enemy country, if not intended to be permanent, will not give the enemy character to the property of such resident, captured in a trade between his own country and that of the enemy. It is material, that the conduct of Mr. Murray, subsequent to the capture, had great influence in determining the fate of his property. Had he returned to the United States, immediately after that event, I do not hazard much, in saying that restitution would have been decreed.

In the case of *The Indian Chief*, Mr. Johnson, an American citizen
*301] domiciliated in England, had engaged *in a mercantile enterprise to the British East Indies—a trade allowed to an American citizen, but prohibited to a British subject. On its return, the vessel came into Cowes, and was seized for being concerned in illicit trade. Mr. Johnson had then left England for the United States. He was considered as not being a British subject, at the time of capture, and restitution was decreed. In delivering his opinion in this case, Sir William Scott said, "Taking it to be clear, that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held, that, from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence, ceases by non-residence. It is an adventitious character, that no longer adheres to him, from the moment that he puts himself in motion, *bonâ fide*, to quit the country

sine animo revertendi." This case undoubtedly proves, affirmatively, that the national character gained by residence ceases with that residence; but I cannot admit it, to prove, negatively, that this national character can be laid down by no other means. I cannot, for instance, admit that an American citizen, who had gained a domicil in England, during peace, and was desirous of returning home, on the breaking out of war, but was detained by force, could, under the authority of this opinion, be treated as a British trader, with respect to his property embarked before a knowledge of the war.

In the case of *La Virginie*, the property of a Mr. Lapierre, who was probably naturalized in the United States, but who had returned to St. Domingo, and had shipped the produce of that island to France, was condemned. But he was considered as a Frenchman, was residing at the time in a French colony, and was engaged in a trade between that colony and the mother country. The case, the judge observed, might have been otherwise decided, had the shipment been made to the United States.

*In the case of *The Jonge Klassina*, Mr. Ravie had a license to make certain importations, as a British subject. He had a house in [*302 Amsterdam, went there in person, during the war, and made the shipment, under his own inspection and control. It was determined, that, in this transaction, he acted in his character as a Dutch merchant, and was not protected by his license. This was a trading during war.

In the case of *The Citto*, the property of Mr. Bowden, a British subject residing in Holland, was condemned. It appeared, that he had settled in Amsterdam, where he had resided, carrying on trade, for six years. In 1795, when the French troops took possession of that country, he left it and settled in Guernsey. The Citto was a Danish vessel, captured in April 1796, on a voyage from a Spanish port to Guernsey, where Mr. Bowden then resided. In June 1796, after the capture of the Citto, he returned to Holland. In argument, it was contended, that it appeared, that British subjects might reside in Holland, without forfeiting their British character, from the proclamation of the 3d of September 1796, which directs the landing of goods, imported under that order into the United Provinces, to be certified by British merchants resident there. The judge was desirous of knowing the nature of Mr Bowden's residence in Holland—whether he had confined himself to the object of withdrawing his property, or had been engaged in the general traffic of the place. If the former, "he may," said the judge, "be entitled to restitution; more especially adverting to the order in council, which is certainly so worded as not to be very easy to be applied." The cause stood for further proof. It is plain, that in this opinion, the residence of the claimant at the time of capture was not considered as conclusive. Had it been so, restitution must have been decreed, because Mr. Bowden was a British subject, and, at that time, resided in Guernsey. It is equally apparent, that, had his subsequent residence in the enemy country been for the sole purpose of withdrawing his property, the law was not understood to forbid restitution. *The language of Sir William [*303 Scott certainly ascribes considerable influence to the proclamation, but does not rest the right of the claimant altogether on that fact.

On the 17th of March 1800, an affidavit of Mr. Bowden, made the 6th of August 1799, was produced, in which he stated his residence in Holland,

previous to the invasion by the French. That he quitted Holland, and landed in England, the 20th of January 1795, whence he proceeded to Guernsey, where he resided with his family. That in the month of June 1796, he was under the absolute necessity of returning to Holland, for the purpose of recovering debts due and effects belonging to the partnership, his partner remaining in Guernsey. The affidavit then proceeded to state many instances of his attachment to his own government, and concluded with averring, that he was still under the necessity of remaining in Holland, for the purpose of recoving part of the said debts and effects, which would be impossible, were he to leave the country ; but that it was his intention to return to his native country, so soon as his affairs would permit, where his mother and his relations reside. The court observed, that it appeared, from the affidavit, that Mr. Bowden was, at that time, in Holland ; and added, "it would be a strange act of injustice, if while we are condemning the goods of persons of all nations resident in Holland, we were to restore the goods of native British subjects resident there. An Englishman residing and trading in Holland, is just as much a Dutch merchant, as a Swede or a Dane would be."

This case was decided in 1800. Mr. Bowden had returned to Holland in 1796, during the war, and had continued in the country of the enemy. It is not denied, that he continued his trade, and the fact that he did continue it, is fairly to be inferred, not only from his omitting to aver the contrary, but from the language of Sir WILLIAM SCOTT. "An Englishman residing and trading in Holland," says that judge, "is just as much a Dutch merchant, as a Swede or a Dane would be." The case of Mr. Bowden, then, is the case of a British subject, who continued to reside and trade in the enemy country, four years after the commencement of hostilities. His *property must have been condemned on one of two principles. Either the judge must have considered his residence in Guernsey, from January 1795, to June 1796, as a temporary interruption of his permanent residence in Holland, and not as a change of domicil, since he returned to that country, and continued in it, as a trader, to the rendition of the final sentence ; or he must have decided, that although Mr. Bowden remained and intended to remain in fact a British subject, yet the permanent national commercial character which he acquired after this capture, retroacted on a trade which, at the time of capture was entirely British, and subjected the property to confiscation. On whichsoever of these principles the case was decided, it is clear, that the hostile character attached to the property of Mr. Bowden, in consequence of his residing and trading in the country of the enemy during the war. This case is, I think, materially variant from one in which the residence and trading took place during peace, and the capture was made before a change of residence could be conveniently effected.

*304]

The Diana is also a case of considerable interest, which contains doctrines entitled to attentive consideration. During the war between Great Britain and Holland, which commenced in 1795, the island of Demarara surrendered to the British arms. By the treaty of Amiens, it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their property acquired and possessed before or during the war, in which term they may

have the full exercise of their religion and enjoyment of their property. Previous to the declaration of war against Holland, in 1803, the Diana and several other vessels, loaded with colonial produce, were captured on a voyage from Demarara to Holland. Immediately after the declaration of war, and before the expiration of three years from the notification of the treaty of Amiens, Demarara again surrendered to Great Britain. Claims to the captured *property were filed by original British subjects, inhabitants of Demarara, some of whom had settled in the colony, while it was [*305 in possession of Great Britain, others before that event. The trial came on, after the island had again become a British colony.

Sir WILLIAM SCOTT decreed restitution to those British subjects who had settled in the colony, while in British possession, but condemned the property of those who had settled there, before that time. He held, that their settling in Demarara, while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power ; which presumption, recognised in the treaty, relieved those claimants from the necessity of proving such intention. He thought it highly reasonable, that they should be admitted to their *jus postliminii*, and be held entitled to the protection of British subjects. But the property of those claimants who had settled before it came to the possession of Great Britain, was condemned. "Having settled without any faith in British possession, it cannot be supposed," he said, "that they would have relinquished their residence, because that possession had ceased. They had passed from one sovereignty to another with indifference ; and if they may be supposed to have looked again to a connection with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of continuing there." "On the situation of persons settled there, previous to the time of British possession, I feel myself," said the judge, "obliged to pronounce that they must be considered in the same light as persons resident in Amsterdam. It must be understood, however, that if there were among these, any who have been actually removing, and that fact is properly ascertained, their goods may be capable of restitution. All that I mean to express is, that there must be evidence of an intention to remove, on the part of those who settled prior to British possession, the presumption not being in their favor." This having been a hostile seizure, though made before the declaration of war, the property is held [*306 equally *liable to condemnation as if captured the instant of that declaration.

So much of the case as relates to those claimants who had settled during British possession, proves that other circumstances than an actual getting into motion for the purpose of returning to his own country, may create a presumption of intending to return ; and may put off that hostile commercial character which a British subject residing and trading in the country of an enemy, is admitted to acquire. The settlement having been made in a country which, at the time, was in possession of Great Britain, though held only by the right of conquest—a tenure known to be extremely precarious, and rarely to continue longer than the war in which the acquisition is made, is sufficient to create this presumption ; but the case does not declare negatively, that no other circumstances would be sufficient.

I am aware, that the part of the case which applies to claimants who had

settled previous to British possession, will, at first view, appear to have a strong bearing on the question before the court. The shipment was in time of peace, and the seizure was made before the declaration of war. The trade was one in which a British subject, in time of peace, might lawfully engage. However strong his intention might be, to return to his native country, in the event of war, he could not be expected to manifest that intention, before the actual existence of war. The re-conquest of the island followed the declaration of war so speedily, as scarcely to leave time for putting in execution the resolution to return, had one been formed. Taking these circumstances into view, the condemnation would seem to be one of extreme severity. Yet, even this case, amitting the decision to be perfectly correct, does not, I think, when accurately examined, go so far as to justify a condemnation under such circumstances as belong to some of the cases at bar. The island having surrendered, during war, such of its inhabitants as were originally British subjects were not allowed to derive, from this re-annexation to the dominions of Great Britain, the advantages to which a voluntary return to
*307] their own country, of the same *date, would have entitled them. They were considered as if they had been "residents of Amsterdam."

But Sir WILLIAM SCOTT observes, that "if there are among these any who have been actually removing, and that fact is properly ascertained, their goods may be capable of restitution." "Actually removing"—when? Not, surely, before the seizure; for that was made in time of peace. Not before the declaration of war, when the original seizure was converted into a belligerent capture; for until that declaration was known, a person whose intention to remain or return was dependent on peace or war, would not be "actually removing." On every principle of equity, then, the time to which these expressions refer, must be the surrender of Demarara, or a reasonable time after the declaration of war was known there. The one period or the other would be subsequent to that event which was deemed equivalent to capture. It is not unworthy of remark, that Sir WILLIAM SCOTT adds explanatory words, which qualify and control the words "actually removing," and show the sense in which he used them. "All," says the judge, "that I mean to express is, that there must be evidence of an intention to remove, on the part of those who settled prior to British possession, the presumption not being in their favor." It would, then, I think, be rejecting a part, and a material part, of the opinion, to say, that an intention to remove, clearly proved, though not accompanied by the fact of removal, would have been deemed insufficient to support the claim for restitution.

Were there no other circumstances of real importance in this case—did it rest solely on the sentiments expressed by the judge, unconnected with those circumstances, I should certainly consider it as leaving open to the claimants before this court, the right of proving an intention to return, within a reasonable time after the declaration of war, by other *overt* acts than an actual removal. But there are other circumstances which I cannot
*308] *deem immaterial; and as the opinions of a judge are always to be taken with reference to the particular case in which they are delivered, I must consider these expressions in connection with the whole case.

The probability is, that the claimants were not merely British merchants. Though the fact is not expressly stated, there is some reason to believe, that

they had become proprietors of the soil, and were completely incorporated with the Dutch colonists. They are not denominated merchants; they are spoken of, through the case, not as residents, but as settlers. "They had passed," said Sir WILLIAM SCOTT, "from one sovereignty to another, with indifference." This mode of expression appears to me to indicate a more permanent interest in the country—a more intimate connection with it than is acquired by a merchant removing to a foreign country, and residing there in time of peace, for the sole purpose of trade. And in another of the same class of cases, it is said, that, previous to the last war, the principal plantations of the island were in possession of British planters, from the other British islands. The voyage, too, in making which the Diana was captured, was a direct voyage between the colony and the mother country. The trade was completely Dutch; and the property of any neutral, wherever residing, if captured in such a voyage, during war, would be condemned. But it is still more material, that those who settled in Demarara, before British possession, must have settled during the war which was terminated by the treaty of Amiens; or, if they settled in time of peace, must have continued there, while the colony was Dutch, and while Holland was at war with Great Britain. Whichever the fact might be, whether they had settled in an enemy country during war, or had continued, through the war, a settlement made in time of peace, they had demonstrated that war made no change in their residence. In their case, then, it might be correctly said, "that war created no presumption of an intention to return"—"that they passed from one sovereignty to another with indifference." *I cannot consider claims, under these circumstances, as being in the same equity with claims made by persons who had removed into a foreign country, in time of peace, for the sole purpose of trade, and whose trade would be annihilated by war. [*309

The case of *The Boedes Lust* differs from *The Diana* only in this: the claimants are not alleged to have been originally British subjects. Restitution was asked, because the property did not belong to an enemy, at the time of shipment, nor at the time of seizure, nor at the time of adjudication. These grounds were all declared to be insufficient: the original seizure was provisionally hostile; and the declaration of war consummated the right to condemn, and vested the property in the crown, as enemy property. The subsequent change in the character of the claimants, who became British subjects, by the surrender of Demarara, could not divest it. "Where property is taken in a state of hostility," said Sir WILLIAM SCOTT, "the universal practice has ever been, to hold it subject to condemnation, although the claimants may have become friends and subjects, prior to adjudication." "With as little effect," he added, "can it be contended, that a *postliminium* can be attributed to these parties. Here is no return to the original character, on which only a *jus postliminii* can be raised. The original character, at the time of seizure, and immediately prior to the hostility which has intervened, was Dutch. The present character, which the events of war have produced, is that of British subjects; and although the British subject might, under circumstances acquire the *jus postliminii*, upon the resumption of his native character, it never can be considered, that the same privilege accrues upon the acquisition of a character totally new and foreign." This opinion is certainly not decisive; but it appears to me rather to favor than oppose the idea, that a merchant residing abroad, and taking measures to return

on the breaking out of war, may entitle himself to the *jus postliminii*, with respect to property shipped before a knowledge of the war.

*310] *The President* was captured on a voyage from the *Cape of Good Hope to Europe. Mr. Elmslie, the claimant, was born a British subject, but claimed as a citizen of the United States. He had removed to the Cape of Good Hope, during the preceding war, and still resided there. The property was condemned. In delivering his opinion, Sir WILLIAM SCOTT, observed, "It is said, the claimant is entitled to the benefit of an intention of removing to Philadelphia, in a few months. A mere intention to remove, has never been held sufficient, without some *overt* act, being merely an intention residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. The expressions of the letter in which this intention is said to be found, are, I observe, very weak and general, of an intention merely *in futuro*. Were they even much stronger than they are, they would not be sufficient. Something more than mere verbal declaration, some solid fact, showing that the party is in the act of withdrawing, has always been held necessary in such cases."

It is to be held in mind, that this opinion is delivered in the case of a person who had fixed his residence in an enemy country, during war, and that he claimed to be the subject of a neutral state. For both these reasons, the war afforded no presumption of his intending to return, either to his native or adopted country. To the vague expression of an intention to return, at some future indefinite time, no influence can be ascribed. When the judge says that "something more than mere verbal declaration, some solid fact, showing that the party is in the act of withdrawing, has always been held necessary in such cases," I do not understand him to say, that the person must have put himself in personal motion to return, must have commenced his voyage homeward, in order to be considered as in "the act of withdrawing." Many other *overt* acts, as selling a commercial establishment, stopping business, making preparations to return, accompanied by declarations of the intent, and not opposed by other circumstances, may, in my opinion, be considered as acts of withdrawing.

In the case of *The Ocean*, Sir WILLIAM SCOTT said, "This claim relates *311] to the situation of British subjects, settled *in a foreign state, in time of amity, and taking early measures to withdraw themselves, on the breaking out of war. The affidavit of claim states, that this gentleman had been settled, as a partner in a house of trade, in Holland, but that he had made arrangements for the dissolution of the partnership, and was only prevented from removing personally, by the violent detention of all British subjects, who happened to be within the territories of the enemy, at the breaking out of the war. It would, I think, under these circumstances, be going further than the principle of law requires, to conclude this person, by his former occupation, and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal."

If other means for removal were taken, than arrangements for the dissolution of the partnership, they are not stated ; and it is fairly to be presumed, that these arrangements were the most prominent of them, since that fact is alone selected and particularly relied upon. In his statement of the case, the reporter says, that the claimant had actually made his escape

and returned to England, in July 1803 (the trial was in January 1804) ; but this must be a mistake, or is a fact not adverted to by the judge, since he says, in his opinion, that the claimant is, at the time, "a constrained resident of France."

I shall notice two other cases which are frequently cited, though I have seen no full report of either of them. The first is the case of *Mr. Curtissos.* This gentleman, who was a British subject, had gone to Surinam in 1766, and from thence to St. Eustatius, where he remained until 1776. He then went to Holland, to settle his accounts, and with an intention, "as was said," of returning afterwards to England to take up his final residence. In December 1780, orders of reprisal were issued by England against Holland. On the first of January 1781, *The Snelle Zeylder* was captured, and, on the 5th of March and 10th of April 1781, the vessel and her cargo were condemned as Dutch property. On *the 27th of April 1781, Mr. [*312
Curtissos returned to England : and on an appeal, the sentence of condemnation was reversed by the lords of appeals, and restitution decreed. Other claims of Mr. Curtissos were brought before the court of admiralty ; and, on a full disclosure of these circumstances, restitution was decreed, before the decree of the lords in the case of *The Snelle Zeylder* was pronounced. (3 Rob. 25.) The principle of this decree is said to be, that Mr. Curtissos was *in itinere*, and had put himself in motion, and was in pursuit of his original British character.

I do not mean to find fault with this decision ; but certainly it presents some strong points more unfavorable to the claimant than will be found in some of the cases now before this Court. Mr. Curtissos had obtained a commercial domicil in the country of the enemy. At the time of the sailing, capture and condemnation of the Snelle Zeylder, he still resided in the country of the enemy. But it is said, he was *in itinere ;* he was in motion in pursuit of his original British character. What was this journey, he is said to have been performing in pursuit of his original character? He had passed from one part of the dominions of the United Provinces to another. He had moved his residence from St. Eustatius to Holland, where he remained from the year 1776 until 1781—a time of sufficient duration for the acquisition of a domicil, had he not previously acquired it. This change of residence, to make the most of it, is an act too equivocal in itself to afford a strong presumption that it was made for the purpose of returning to England. Had his stay in Holland even been short, a colonial merchant trading to the mother country, may so frequently be carried there on the business of his trade, that the fact can afford but weak evidence of an intention to discontinue that trade : but an interval of between four and five years elapsed between his arrival in Holland and his departure from that country, during which time he is not stated to have suspended his commercial pursuits, or to have made any arrangements, such as transferring his property to England, or making an establishment there, which might indicate, [*313
*by overt acts, the intention of returning to his native country. This journey to Holland, connected with this long residence, would seem to me, to be made as a Dutch merchant, for the purpose of establishing himself there, rather than as preparatory to his return to England. But it was said, that he intended to return to England. How was this intention shown? If not by his journey to Holland and his long residence there, it was only shown by

his being employed in the settlement of his accounts, while a merchant at St. Eustatius, a business in which he would of course engage, whatever his future objects might be. This equivocal act does not appear to have been explained, otherwise than by his own declarations ; nor does it appear that these declarations were made previous to the capture. But could I even admit, that the journey from St. Eustatius to Holland, was made with a view of passing ultimately from Holland to England, yet the intention was not to be immediately executed. The time of carrying it into effect, was remote and uncertain ; subject to so many casualties that, had not the war supervened, it might never have been carried into effect. But laying aside these circumstances, the case proves only, that being *in itinere*, in pursuit of the native character, divests the enemy character required by residence and trading; it is not insinuated, that this character can be divested by no other means.

Mr. Whitehill's case, though one of great severity, does not, I think, overturn the principle I am endeavoring to sustain. He went to St. Eustatius, but a few days before Admiral Rodney and the British forces made their appearance before that place. But it was proved, that he went for the purpose of making a permanent settlement there ; no intention to return appears to have been alleged. The recency of his establishment seems to have been the point on which his claim rested. This case, in principle, bears on that before the court, so far only as it proves that war does not, under all circumstances, necessarily furnish a presumption, that the foreigner residing in the enemy country, intends to return to his own. The circumstances of this *314] *case, so far as we understand them, were opposed to the presumption that war could affect Mr. Whitehill's residence. War actually existed at the time of his removal ; and had that fact been known to him, there would have been no hardship in his case. He would have voluntarily taken upon himself the enemy character, at the same time that he took upon himself the Dutch character. There is reason to believe that the court considered him in equal fault with a person removing to a country known to be hostile. St. Eustatius was deeply engaged in the American trade, which, from the character of the contest, was, at that time, considered by England as cause of war, and was the fact which drew on that island the vengeance of Britain. Mr Whitehill could have fixed himself there only for the purpose of prosecuting that trade. "He went," says Sir William Scott, "to a place which had rendered itself particularly obnoxious by its conduct in that war." This was certainly a circumstance which could not be disregarded, in deciding on the probability of his intending to remain in the country, in the event of war.

These are the cases which appear to me to apply most strongly to the question before this court. No one of them decides, in terms, that the property of a British subject, residing abroad, in time of amity, which was shipped, before a knowledge of war, and captured by a British cruizer, shall depend, conclusively, on the residence of the claimant at the time of capture, or on his having, at that time, put himself in motion to change his residence. In no case which I have had an opportunity of inspecting, have I seen a *dictum* to this effect. The cases certainly require an intention, on the part of the subject residing and trading abroad, to return to his own country, and that this intention should be manifested by *overt* acts ; but

they do not, according to my understanding of them, prescribe any particular *overt* act, as being exclusively admissible; nor do they render it indispensable that the *overt* act should, in all cases, precede the capture. If a British subject, residing abroad for commercial purposes, takes decided measures, on the breaking out of war, for returning to his native country, and especially, if he should actually return, his claim for the restitution of property, shipped before his knowledge of *the war, would, I think, be favorably received in a British court of admiralty, although his [*315 actual return, or the measures proving his intention to return, were subsequent to the capture. Thus understanding the English authorities, I do not consider them as opposing the principle I have laid down.

An American citizen, having merely a commercial domicil in a foreign country, is not, I think, under the British authorities, concluded, by his residence and trading in time of peace, from averring and proving an intention to change his domicil on the breaking out of war, or from availing himself of that proof in a court of admiralty. The intrinsic evidence arising from the change in his situation, produced by war, renders it extremely probable, that in this new state of things, he must intend to return home, and will aid in the construction of any *overt* act by which such intention is manifested. Dissolution of partnership, discontinuance of trade in the enemy country, a settlement of accounts, and other arrangements obviously preparatory to a change of residence, are, in my opinion, such *overt* acts as may, under circumstances showing them to be made in good faith, entitle the claimant to restitution.

I do not perceive the mischief or inconvenience that can result from the establishment of this principle. Its operation is confined to property shipped before a knowledge of the war. For if shipped afterwards, it is clearly liable to condemnation, unless it be protected by the principle that it is merely a withdrawing of funds. Being confined to shipments made before a knowledge of the war, the evidence of an intention to change or continue a residence in the country of the enemy, must be speedily given. A continuance of trade, after the war, unless, perhaps, under very special circumstances, and for the mere purpose of closing transactions already commenced, would fix the national character and the domicil previously acquired. An immediate discontinuance of trade, and arrangements for removing, followed by actual removal, within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicil, and show that the intention to return had never been abandoned; that the intention to remain always had never *been formed. It is a case, in which, if in any that can [*316 be imagined, justice requires that the citizen, having entirely recovered his national character by his own act, and by an act which shows that he never intended to part with it finally, should, by a species of the *jus postliminii*, be allowed to aver the existence of that character, at the instant of capture. In the establishment of such a principle, I repeat, I can perceive no danger. In its rejection, I think, I perceive much injustice. An individual whose residence abroad is certainly innocent and lawful, perhaps, advantageous to his country, who never intended that residence to be permanent, or to continue in time of war, finds himself, against his will, clothed with the character of an enemy, so conclusively, that not even a

return to his native country can rescue from that character and from confiscation, property shipped in the time of real or supposed peace. My sense of justice revolts from such a principle.

In applying this opinion to the claimants before the court, I should be regulated by their conduct, after a knowledge of the war. If they continued their residence and trade, after that knowledge, at any rate, after knowing that the repeal of the orders in council was not immediately followed by peace, their claim to restitution would be clearly unsustainable. If they took immediate measures for returning to this country, and have since actually returned, or have assigned sufficient reasons for not returning, their property, I think, may be capable of restitution. Some of the claimants would come within one description, some within the other. It would, under the opinion given by the court, be equally tedious and useless to go through their cases.

My reasoning has been applied entirely to the case of native Americans. This course has been pursued for two reasons. It presents the argument in what I think its true light; and the sentence of condemnation makes no discrimination between native or other citizens. The claimants are natives of that country with which we are at war, who have been naturalized in the United States. It is imposible to deny, that many of the strongest arguments urged to prove the probability that war must determine
*317] the native American citizen to abandon *the country of the enemy and return home, are inapplicable, or apply but feebly, to citizens of this description. Yet, I think, it is not for the United States, in such a case as this, to discriminate between them. I will not pretend to say, what distinctions may or may not exist between these two classes of citizens, in a contest of a different description. But in a contest between the United States and the naturalized citizen, in a claim set up by the United States to confiscate his property, he may, I think, protect himself by any defence which would protect a native American. In the prosecution of such a claim, the United States are, I think, if I may be excused from borrowing from the common law a term peculiarly appropriate, estopped from saying that they have not placed this adopted son on a level with those born in their family.

Livingston, J., concurred in the opinion with the Chief Justice.